

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Date **21/02/2011**

Appeal No. E/1964/2010 - EX[DB] WITH E/S/1889/10-EX

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S CROMPTON GREAVES LTD.

PLOT NO. T1 & T2, AKVN INDUS. AREA,
MALANPUR-477116, DISTT. BHIND.
M/S CROMPTON GREAVES LTD.

Appellant

Vs

Respondent

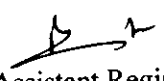
EX[DB] dated 14-2-11

C.C.E. INDORE

STAY ORDER NO.271/2011-EX

2011

I am directed to transmit herewith a certified copy of **Final order No. 195/**
passed by the Tribunal under **Section 35-C(1) of Central Excises Act, 1944**


Assistant Registrar

(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. INDORE

MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult

MR.RANDHIR SINGH,ADVOCATE

37, LOWER GROUND FLOOR, WORLD
TRADE CENTRE, BARAKHAMBA AVENUE,
N DELHI.

3. C.D.R

4. Bar association. CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

10. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15

11. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

13. Office Copy

14. Guard file

15. HON'BLE PRESIDENT.



Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI.

Excise Stay No.1889 of 2010 in
in Excise Appeal No.1964 of 2010-Excise

M/s. Crompton Greaves Ltd.

...Appellant

Vs.

CCE, Indore

...Respondent

Appearance: Rep.by Shri Randhir Singh, Advocate for the appellants.
Rep. by Shri Sunil Kumar, DR for the respondent.

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

STAY Order No. 271/2011-Ex Dated: 14.02.2011

Per Justice R.M.S. Khandeparkar:

Heard Id. Advocate for the appellants and DR for the respondent.

2. Since we propose to dispose of the appeal itself, the application is allowed without insisting for deposit in the matter with direction to the Registry to place the matter for final disposal forthwith.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Ckp.

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI.

Excise Appeal No.1964 of 2010-Excise

(Arising out of Order-in-Appeal No.IND-I/103/2010 dated 31.03.2010 passed by the Commissioner of Central Excise (Appeals-I), Indore).

For approval and signature:

Hon'ble Shri Justice R.M. S. Khandeparkar, President

Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see
CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the
CESTAT (Procedure) Rules, 1982 for publication
in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy
of the Order?

4. Whether Order is to be circulated to the Departmental
authorities?

M/s. Crompton Greaves Ltd.

.....Appellant

Vs.

CCE, Indore

...Respondent

Appearance: Rep. by Shri J.F. Poch Khanawala, Sr. Advocate &
Rep.by Shri Randhir Singh, Advocate for the appellants.
Rep. by Shri Sunil Kumar, DR for the respondent.

CORAM: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. 195/2011-20 /Dated: 14.02.11

Per Justice R.M.S. Khandeparkar:

Heard Id. Advocate for the appellant and DR for the respondent.

2. This appeal arises from the order dated 12.04.2010 passed by the Commissioner (Appeals), Indore, whereby the appeal filed by the appellant against the order of the adjudicating authority dated 19.10.2009 has been dismissed.
3. The Addl. Commissioner, Indore by his order dated 19.10.2009 had confirmed the demand of duty amounting to Rs.8,88,718/- along with interest thereon and penalty of Rs.3 Lakh against the appellant.
4. The appellants are engaged in the manufacture of transformers and parts thereof classifiable under Chapter Heading No.8504 of the Schedule to the Central Excise Tariff Act, 1985. The appellants are also availing Cenvat credit on the inputs, capital goods and service tax in accordance with the provisions of the law applicable thereto.
5. A show cause notice dated 5.3.2008 came to be issued to the appellants on two grounds – one that the appellants had sold transformers to their sister division at the cost of production + 10% as prescribed under Rule 8 of the Valuation Rules in spite of the fact that the provisions of law applicable to the case of the appellants are comprised under Rule 11. Secondly, that the appellants had failed to inform the department about the sale of the goods to the related persons. Consequently, the appellants were required to show cause as to why the duty amount to the tune of Rs.8,64,588/- along with Education Cess of Rs.24,129/- should not be

recovered under Section 11 A(1) of the Central Excise Act, 1944 along with interest under Section 11 AB should not be recovered and penalty under Section 25 of the Central Excise Rules, 2002 should not be imposed.

6. The appellants contested the proceedings inter alia submitting as under:-

“5.4 Each of the transformers manufactured by us, though of the same rating i.e. 1000 KVA, 1250 KVA etc. is different in design and function. These could be in areas of losses, out put voltage, input voltage etc. Each of the transformers is custom built on the basis of requirement and these can not be equated in terms of price. Hence for each removal transaction value has to determine separately. SCN has wrongly given instance of clearance of same rating transformer to other buyers for “comparable goods prices” i.e. Vardhman Fabrics and Sumita Tex Spin. However, departmental authorities have failed to notice the difference in the transformers. For instance in the case of Sumita Tex Spin the voltage ratio was 66/11 KV for 7500 KVA transformer while in case of EPD the voltage ratio was 33/6.9 KV for 7500 KVA transformer. Similarly for Vardhman Fabrics the ratio was 33/11 KV while in case of EPD this was 33/6.9 for 10 MVA Transformer. These difference in designs gives rise to different material contents and usage, thus giving rise to pricing of transformer differently though of same rating. Hence each transformer shall have different price and comparable price formula is totally wrong and cannot be adopted. Even Rule 11 of valuation rules only says that if price cannot be determined by any method of rule 4 to 10, the value can be determined using reasonable means consistent with provisions of Rule 4(1) of the

Act. The Tribunal in case of **Reliance Industries Ltd. Vs. CCE [2006 (201) ELT 622]** has also held that valuation under rule 11 read with rule 8 is the best judgement assessment. Tribunal even in case of **CCE Vs. VPC Poles Factory [2006 (199) ELT 865]** has held that when no rule is applicable, adopting principle of rule 8 is reasonable. In our case since the comparable price is not available the rule 8 is the best judgment assessment. Hence irrespective of the amount paid/realized form EPD, the cost of production plus 10% is the best valuation method from all perspective.

5.5 The allegation in para 3(iv) that CA certificate is not in accordance with the CAS is based on wrong assumption without ascertaining the facts. Material content of each transformer has been certified. Further the “manufacturing overhead” of 17.56% is **inclusive of labour and all factory cost put together** and is not only production overhead as understood. This can be verified from the profit and loss attached with this reply.

This 17.56% is based on audited accounts of year 2005-2006 as applied to material cost. Hence the CA certificate for cost of production is not to be summarily rejected. The cost worked out as per CA certificate is the right valuation as per rule 8 of the Valuation Rules 2000 and excise duty has been rightly paid. The allegation of short payment is not sustainable.”

7. The adjudicating authority while disposing the matter held thus:-

“ I agree to the submission of the noticee that the transformers prices do not depend solely on the basis of rating but also requirements of a transformers i.e. material content in transformers, the input/output voltage, line losses desired by the customer, whether online taping is required or off line etc. and consequently the prices of transformers of the same ratings, are not comparable.”

8. After recording the above findings in relation to the first charge, the adjudicating authority proceeded to deal with the second charge, which related to the issue of CAS-4 as under:-

“ The allegation in para 3(iv) of the show cause notice, is that the certificate of cost issued by the chartered accountant and relied upon for valuation by the notice is not in accordance with the Cost Accounting Standard on cost of production for captive consumption, as prescribed on CAS-4. And it is also alleged that the cost of direct wages and salaries, direct expenses, work overheads, R & D and Quality Control etc. have not been considered while arriving at valuation of goods cleared by related person at the site of captive consumption. The notice have not contested these facts, which are basis for arriving at the correct assessable value of excisable goods cleared to related person for payment of duty. The notice have relied upon the Tribunal's (Chennai) order in case of **Hydraulics (P) Ltd. Vs.CCE – 2008 (228) ELT 598**, wherein it has been held that when the goods are cleared to sister units or subsidiary companies the clearance is to be valued under Rule 8 only and requested for dropping of the show cause notice. In other words, the noticee has pleaded for valuation of the impugned goods under Rule 8 which states that “where the excisable goods are not sold but are used for consumption by him or on his behalf in the production or manufacture of other articles the value shall be one hundred and ten per cent of cost of production.” In other words, the 110% cost just before consumption of excisable goods.”

9. Obviously, therefore, the adjudicating authority held that the allegations regarding the price differences made by the department against the appellants were not true as the prices of the transformers supplied to different firms were not comparable on account of various

reasons pointed out by the assessee and noted with acceptance by the adjudicating authority. At the same time, the adjudicating authority assumed that as regards the second ground on which the show cause notice was issued, the same was not contested by the assessee when in fact the reply filed to the show cause notice clearly disclosed that the appellants had clearly contested the contention in that regard sought to be raised by the department. Being aggrieved by the order of the adjudicating authority, the assessee preferred appeal before the Commissioner (Appeals), which came to be disposed of by the impugned order.

10. The Commissioner (Appeals) after recording the rival contentions sought to be canvassed before him and taking note of the statutory provisions including the provisions of Rule 8 of the Valuation Rules, and Section 4 of the Act proceeded to decide thus:-

“ In the instant case price of the comparable goods to independent buyer was available with the Appellant as is evident from the sale of 7500KVA Copper bound transformer made to M/s. Sumita Tex Spin Pvt. Ltd. at Rs.6121000/-. The price of the goods was known prior to sale of goods and Appellant should not have resorted to Rule 8 of the Valuation Rules. Price was also known when a contract for setting up of a switchyard project of Rs.53 million was made on 19.07.06 by M/s. Crompton Greaves Ltd. Engg. Project Division and accordingly, cost was distributed on all the equipments used in the said switchyard project as is evident from the said contract.

Citation of case laws given by the appellant in their defense are also not relevant in the facts and circumstances of the present case because in all these case laws, the issue discussed is regarding valuation of goods which were further put to use or consumed in the production or manufacture of other products/articles.

In the light of above discussion and facts of the case, I do not find the appeal sustainable.”

11. Plain reading of the impugned order discloses that while the adjudicating authority had accepted the contentions sought to be raised on behalf of the assessee in relation to the first charge against the assessee, and there was a clear finding that the prices of different transformers were not comparable for various reasons recorded in the impugned order, there was no challenge by the department to the said finding. Undisputedly, there were no cross objections filed by the department before the Commissioner (Appeals). Being so, the said finding by the adjudicating authority had attained finality. In those circumstances, it was not open to the Commissioner (Appeals) to arrive at any finding contrary to the said finding. However, plain reading of the impugned order discloses that the Commissioner (Appeals) proceeded to decide the issue in relation to the first charge as if the Commissioner was dealing with an appeal at the instance of the department against the said finding. This clearly amounted to exceed the limits of appellate jurisdiction of the Commissioner (Appeals) while dealing with the appeal filed by the assessee. In the absence of any challenge to the said findings, it was not open to the Commissioner (Appeals) to re-open the said issue.

12. As regards the second issue is concerned, we find no discussion at all in the impugned order. In spite of the fact that the assessee had disputed the second charge, the adjudicating authority had proceeded on the basis that the said charge was not disputed by the assessee and exactly on that count, the appellant had filed appeal before the Commissioner (Appeals). However, the impugned order does not disclose any application of mind by the Commissioner (Appeals) to this aspect of the matter.

13. For the reasons stated above, therefore, the impugned order is not sustainable and is liable to be set aside and the matter is to be remanded to the Commissioner (Appeals) to decide same afresh in accordance with the provisions of law. We make it clear that on the issue, which is sought to be raised by the appellants in relation to the dispute in the matter, we have not expressed any opinion and the same is kept open for appropriate order by the Commissioner (Appeals) in accordance with the provisions of law. The appeal accordingly stands disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Ckp.